

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----In the Matter of----)
)
MOLOKAI PUBLIC UTILITIES, INC.,)
WAI'OLA O MOLOKA'I, INC., and)
MOSCO, INC.)
)
For Temporary Rate Relief.)
_____)

DOCKET NO. 2008-0115

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PUBLIC UTILITIES
COMMISSION

MOTION TO MODIFY ORDER OF JUNE 23, 2008
DIRECTING MOLOKAI PROPERTIES, LTD.
TO PARTICIPATE IN DOCKET NO. 2008-0115

DECLARATION OF ELAINE HAMMOND

CERTIFICATE OF SERVICE

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TO PARTICIPATE IN DOCKET NO. 2008-0115

By this motion, Molokai Properties Limited ("MPL") is appearing specially to contest the jurisdiction of the Public Utilities Commission ("the Commission") to direct MPL to fully participate in Docket No. 2008-0115, as set forth in the Order filed on June 23, 2008 ("the Order to Participate"). That docket is a proceeding commenced by the Commission on June 16, 2008, to authorize temporary rate relief, via a temporary surcharge, to three utilities, namely, Molokai Public Utilities, Inc. ("MPU"), Wai'ola O Moloka'i ("Wai'ola"), and Mosco, Inc. ("Mosco"). The object of that proceeding is to establish temporary rates that will enable the utilities to operate on a self-sustaining basis. If such relief is granted to MPU and Wai'ola, no adjustment to the rates being charged by Mosco will be necessary.

In a June 18, 2008 letter, MPL has questioned the Commission's authority over MPL with respect to matters other than a right to examine into transactions between public utilities and MPL pursuant to Hawaii Revised Statutes ("HRS") Section 269-8. MPL has already responded to the Commission's request for information concerning the amount of funds

furnished to the Utilities by MPL for the period covered by the request. MPL has received no information request from the Commission to which it has not previously replied.

In the Order to Participate, the Commission has suggested various arguments to support its right to require MPL to fully participate in the proceeding that it has commenced, but a careful examination of those arguments demonstrates that they do not provide the basis for the jurisdiction that the Commission asserts.

First, we note that MPL is not the owner of the sewer company involved in the instant proceeding, Mosco. Mosco is owned by Kaluakoi Sewer, LLC, which is itself owned by Kaluakoi Water LLC, which is owned in turn by Kaluakoi Land, LLC, which is ultimately owned by MPL. Declaration of Elaine Hammond. MPL does own other private sewer companies that are not involved in the instant proceeding, and to that extent MPL falls within the definition of a "public utility." However, those private sewer companies are not involved in this proceeding. Under HRS § 269-6(a), the Commission's supervisory authority over public utilities is what is "hereinafter set forth"; it is not comprehensive and without limitation. Being a public utility is not itself a basis for the Commission to require MPL to participate in this unrelated proceeding, any more than it would justify an order compelling Hawaiian Electric Company or Maui Electric Company to participate. Consequently, reliance upon the fact that MPL is a "public utility" within the meaning of HRS § 269-1(1)(A), the statute on which the Commission's order relies, is insufficient. There must be some provision in Chapter 269 set forth after its section 6 that implicates MPL in these proceedings before jurisdiction will lie to compel MPL's participation here.

It is also noteworthy that Mosco is not seeking and may not need a rate increase in this docket. If self-sustaining rates are awarded to MPU and Wai'ola, no change in the rates for

Mosco will be required, and Mosco would therefore be involved in this docket as a purely nominal party that seeks no relief in the docket unless and until MPU and Wai'ola are not given self-sustaining temporary rates.

The Commission has also relied as the basis for its claim of jurisdiction on "MPL's promise in Wai'ola's application for a certificate of public convenience and necessity that 'losses sustained by Wai'ola in its operations will be covered by additional capital contributions by [MPL] or by loans.'" The application referenced was the application of Wai'ola, not MPL, in Docket No. 7122, filed more than fifteen years ago. The application was granted by Decision and Order No. 12125 ("the D&O"), filed on January 13, 1993. As clearly reflected by page 6 of the D&O, the entity making known its beliefs and representations was "the Applicant," i.e., Wai'ola. Wai'ola's representations concerning the willingness of MPL to cover any losses that Wai'ola sustained in its operations was limited to "the near term," and extended only until "the development of Maunaloa Village," which has long since been completed. Id. at 6. The D&O makes clear that, far from making a perpetual commitment to cover Wai'ola's losses, MPL was hoping "to recoup its investment in the long term through future increases in rates and tap-in charges." Id. There is no reasonable basis for the implication of the Commission that MPL was promising for an indefinitely long future, extending past the development of Maunaloa Village, to cover the operating losses of Wai'ola. On the contrary, the period covered by the supposed promise of MPL, i.e., the period before the development of Maunaloa Village, was a period when all of the Wai'ola facilities were used "to provide water for [MPL's] ranch operations, its subsequent tenants and the residents of the [undeveloped] Maunaloa Village." D&O at 3. Those residential users were tenants of Molokai Ranch. Id. at 4. In other words, the supposed commitment of MPL to cover Wai'ola's losses applied to the period while MPL was itself using

Wai'ola's water solely for its own operations or those of its tenants, and did not extend to the period after other users become customers as a result of the development of Maunaloa Village. Although under no obligation to do so, MPL did cover those losses and is still covering those losses, although it has indicated that it will cease to do so after August 31, 2008.

Finally, and perhaps most significantly, nothing in the D&O ordered MPL to provide any form of financial support for Wai'ola. At most the D&O might be construed as making MPL's financial support a condition of the effectiveness of Wai'ola's certificate of public convenience and necessity, and even this interpretation is not supported by any conclusion or approval set forth in the D&O. However, such a condition would provide no jurisdictional basis for a directive to MPL to participate. It would, at most, comprise a basis to cancel Wai'ola's certificate, an issue which is not the subject of the current docket and which certificate Wai'ola has already offered to surrender.

This leaves the Commission's invocation of HRS §§ 269-7 and 269-8 as the final basis for the jurisdiction over MPL claimed by the Commission. MPL recognizes the authority of the Commission to obtain information from MPL and to investigate transactions between the utilities and MPL. MPL has been voluntarily cooperating with the Commission's previous requests for information. It must be noted, however, that an "investigation" is not a "proceeding[] before the PUC," as HRS § 269-10 makes clear. The current docket is clearly a proceeding, as the Commission's order directing MPL to participate itself declares in its title. The authority of the Commission to conduct investigations provides no authority for it to make MPL a party to a *proceeding* involving temporary rate increases for other companies and commenced by the Commission. If the Commission desires additional information beyond what

has been furnished to date as part of an investigation, MPL requests that the Commission identify it, and MPL will cooperate in the information request.¹

By virtue of its jurisdictional objections, MPL will participate in this proceeding only to the extent of a special appearance before a hearings officer so that it can be heard as to those objections. MPL respectfully requests the Commission either to reconsider and vacate the "Order Directing MPL to Participate in This Proceeding" or to arrange a contested case hearing on the jurisdictional issues prior to any proceeding involving MPL.

Dated: Honolulu, Hawaii, July 14, 2008.

A handwritten signature in black ink, appearing to read 'D. Orodenger', is written over a horizontal line.

DANIEL ORODENER
Attorney for Molokai Properties Limited

¹ The Order to Participate also alludes, without any citation to statutory authority, to MPL's "affiliation with the Utilities" and ownership of "property associated with the Utilities' service territories" as a basis for the directive for MPL to participate. The failure to provide any statutory reference to jurisdiction based on either affiliation or associated property makes it difficult for MPL to respond to this allusion, other than to say that the Commission is an agency whose jurisdiction is confined to its enabling statute, and no statutory authority is cited for this claim.

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DECLARATION OF ELAINE HAMMOND

Elaine Hammond hereby declares and states, under penalty of perjury:

1. I am the financial controller of Molokai Properties, Ltd. ("MPL") and have personal knowledge of the facts set forth below.

2. MPL is not the owner of the sewer company known as Mosco Inc. Mosco Inc. is owned by Kaluakoi Sewer, LLC, which is itself owned by Kaluakoi Water LLC, which is owned in turn by Kaluakoi Land, LLC. MPL is the owner of Kaluakoi Land, LLC.

Dated: Honolulu, Hawaii, July 14, 2008.



ELAINE HAMMOND

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of the within document was duly served
on the following:

CATHERINE P. AWAKUNI

Executive Director

Department of Commerce and Consumer Affairs

Division of Consumer Advocacy

P.O. Box 541

Honolulu, Hawaii 96809

Via Facsimile
(808-586-2780)

P.A. NICHOLAS

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Mosco, Inc.

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Honolulu, Hawaii 96813

Via Hand Delivery

BRIAN T. MOTO

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PUBLIC UTILITIES COMMISSION

465 South King Street, Room 103

Honolulu, Hawaii 96813

Via Hand Delivery

DATED: Honolulu, Hawaii, July 14, 2008.



JAMES N. DUCA

On Behalf of Molokai Properties Limited